UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

JESSY BOUSTANY,

Case No.: 15-cv-10023

Plaintiff,

-against-

XYLEM INC. and GEORGE EL HANI, *Individually*.

Defendant

---X

PLAINTIFF BOUSTANY'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT GEORGE EL-HANI'S MOTION TO DISMISS THE COMPLAINT AND STAY DICOVERY PENDING DETRMINATION OF THE MOTION

ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT

The Plaintiff, Jessy Boustany, (hereinafter "Boustany" or "Plaintiff"), respectfully submits the within memorandum of law in opposition to Defendant George El-Hani (hereinafter "El-Hani" or "Defendant")'s motion to dismiss the amended complaint. As illustrated by case law and all the pleadings, this Court has jurisdiction over Defendant El-Hani and Defendant El-Hani's motion should be dismissed in its entirety.

ARGUMENT.

A. SERVICE OF THE COMPLAINT WAS PROPER

Rule 4(f) of the Federal Rules of Civil Procedure states that serving an individual in a foreign country can be done:

(1) By an internally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) If there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

A. as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

B. as the foreign authority directs in response to a letter rogatory or letter of request; or

C. unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

Service was properly effectuated when Defendant El-Hani's housemaid, Fillista, was personally served with Plaintiff's summons and complaint on February 8, 2016 by the Civil Court of Appeal. As per the affidavit of service, Fillista was served at Defendant El-Hani's home in Lebanon. According to the 'Notice & Notification", which was served by a designee of the Lebanese Civil Court of Appeal, Defendant El-Hani owns this house and Fillista lives with him.

Defendant El-Hani's affidavit states that the location where Defendant was served is not his residence but is a commercial building which was assigned in August 2014. Defendant El-Hani further states that the housekeeper who accepted the summons and complaint on his behalf does not reside or work at that same address. These statements are contrary to the sworn statement of the designee of the Lebanese Civil Court of Appeal whom swears, under oath, that Defendant El-Hani was properly served at his residence through his housemaid.

Nonetheless, the Court should deem service upon Defendant El-Hani to be proper. Subsection 4(f)(3) allows for service to be effectuated by other means not prohibited by international agreement, as the court orders. Defendant El-Hani was served at his home by leaving a copy of the summons and complaint at the individual's dwelling or usual place of abode with someone is proper service within the Judicial District of the United States. Moreover, Defendant El-Hani has actual notice of the litigation and is not prejudiced from this method of service. (See Exhibit A).

B. THE COURT HAS PERSONAL JURISDICTION OVER DEFENDANT EL-HANI

a. Standards for Dismissal Under 12(b)(2)

On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant. Metro Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir 1996). However, "[p]rior to discovery, a plaintiff may defeat a motion to dismiss based on legally sufficient allegations of jurisdiction." In re

Magnetic Audiotape Antitrust Litigation, 334 F.3d 204, 206 (2d Cir 2003). Furthermore, in considering a Rule 12(b)(2) motion, the pleadings and affidavits are to be construed in the light most favorable to plaintiff, the non-moving party, and all doubts are to be resolved in plaintiff's favor. See DStefano v. Carozzi N. Am. Inc. 286 F.3d 81, 85 (2d Cir. 2001).

b. Defendant El-Hani Regularly Transacts Business in New York

CPLR § 301, confers on New York courts general personal jurisdiction over any non-resident or foreign corporation "engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of its presence in this jurisdiction." McGowan v. Smith, 52 N.Y.2d 268, 272 (1981). A party subject to general personal jurisdiction in New York may be sued in New York on any claim, whether or not the claim arose in New York or from any of the defendant's contacts with New York.

Defendant El-Hani submitted an affidavit in an attempt to argue that he does not regularly transact business in New York. Defendant's affidavit is patently deficient. Plaintiff believes that during Defendant El-Hani's tenure with Xylem, he had sufficient contacts with New York to warrant this Court's personal jurisdiction over him. Defendant El-Hani affidavit only addresses his presence in New York on three separate occasions; of which he failed to identify the specifics two of the three occasions in his affidavit. It does not provide information about the frequency contact, meetings, calls, etc. that were made between him Defendant Xylem's headquarters during his time as Managing Director. Without this information, the affidavit fails to demonstrate that Plaintiff's assertions are incorrect and that Defendant El-Hani does not engage in a continuous and systematic course of 'doing business' here.

c. Defendant El-Hani is subjected to New York Laws by New York's Long Arm Statute.

This Court has personal jurisdiction over Defendant El-Hani pursuant to the "transacts business" test of New York CPLR §302(a)(1). To establish personal jurisdiction under §302(a)(1), the plaintiff must show that "(1) [t]he defendant . . . transacted business within the state; and (2) the claim asserted must arise from that business activity." Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt, LLC, 450 F.3d 100, 103 (2d Cir. 2006) (citations omitted).

This first prong is established by showing that a defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." SAS Group, Inc. v. Worldwide Inventions, Inc., 245 F. Supp. 2d 543, 548 (S.D.N.Y. 2003) (citations and internal quotation marks omitted). *See also* Treeline Inv. Partners, LP v. Koren, 2007 U.S. Dist. LEXIS 47748, at *8 (S.D.N.Y. 2007) (Purposeful activity means "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."); Moskowitz v. La Suisse, Société D'Assurances sur la Vie, 282 F.R.D. 54, 60 (S.D.N.Y. 2012). The activity need not even be commercial in nature. Best Van Lines, Inc. v. Walker, 490 F.3d 239, 247 n.10 (2d Cir. 2007). "Transacting business requires only a minimal quantity of activity, provided that it is of the right nature and quality and, in making a determination, a court must analyze the totality of the defendant's contact with the forum." Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp., 98 F.3d 25, 29 (2d Cir. 1996) (internal quotations and citations omitted).

In addition, it is well settled that "a single transaction would be sufficient to fulfill this requirement." Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 787 (2d Cir. 1999) (internal quotation marks and citation omitted); See also Treeline Inv. Partners, LP v. Koren, 2007 U.S. Dist. LEXIS 47748, at *8 (S.D.N.Y. 2007) ("proof of one transaction, or a single act, in New York, is sufficient to invoke long-arm jurisdiction, even though the defendant never enters New York"); Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 466 (1988) (proof of even "one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York"); Launer v. Buena Vista Winery, Inc., 916 F.Supp. 204, 209-210 (E.D.N.Y. 1996) (California defendants "transact[ed] business" in New York within CPLR 302(a)(1) where only a couple of the acts that formed the basis for Plaintiff's Title VII claim occurred in New York).

"The fact that the non-domiciliary was never physically present in New York is not controlling. Rather, the proper focus is whether the totality of the circumstances demonstrates that the defendants purposefully availed themselves of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws." Picard v. Elbaum, 707 F. Supp. 144, 145 (S.D.N.Y. 1989) (internal quotation marks, citations, and brackets omitted)(emphasis added).

The second prong is established where there is a "'substantial nexus' between the business transacted and the cause of action sued upon." Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt, LLC, 450 F.3d 100, 103 (2d Cir. 2006) (citations omitted). While it must be shown that the claim "arises out of the subject matter of the business transacted," Citigroup Inc. v. City Holding Co., 97 F. Supp. 2d 549, 564 (S.D.N.Y. 2000), "[a] suit will be deemed to have arisen out of a party's activities in New York if there is an articulable nexus, or a substantial relationship, between the claim asserted and the actions that occurred in New York." Henderson v. I.N.S., 157 F.3d 106, 123 (2d Cir. 1998) (internal quotations omitted); See also, LaChapelle v. Torres, 2014 U.S. Dist. LEXIS 26128, at *34 (S.D.N.Y. 2014) ("This standard does not require a 'causal link between the defendant's New York business activity and a plaintiff's injury' but instead merely requires a relatedness such that the claim is not 'completely unmoored' from the business activity.")

New York federal district courts have applied the "transacts business" long-arm clause to non-domiciliaries in discrimination cases. For example, in International Healthcare Exch., Inc. v.

Global Healthcare Exch., LLC, 470 F. Supp. 2d 345, 360 (S.D.N.Y. 2007), the court held that it had personal jurisdiction pursuant to section 302(a)(1) over the plaintiff's out-of-state supervisors for her gender discrimination claims. The plaintiff worked for the foreign corporation out of an office in her home. Id. at 358. The communications and work assignments that the plaintiff alleged were discriminatory were sent to the plaintiff by the individual defendants "via telephone, email, and fax to her home office in New York." Id. at 358-59. The court found that these communications and assignments were business transactions under the first prong of the test. Id. Additionally, because these communications and assignments "form the substantive basis" for the plaintiff's claims against the defendants, the court held that the transactions had a sufficient nexus to the cause of action and exercised personal jurisdiction over the individual defendants. Id. at 359; *see also*, Launer v. Buena Vista Winery, Inc., 916 F. Supp. 204, 210 (E.D.N.Y. 1996) (exercising personal jurisdiction under section 302(a)(1) over foreign employer based on defendant's communications with plaintiff in New York and decision not to rehire made at meeting in New York, thereby purposefully availing itself of jurisdiction in the state).

In the case at bar, all employees of Defendant Xylem are required to acknowledge and abide by its Code of Conduct. Within its text, each employee is to agree to comply by laws of the United States and the countries where Defendant Xylem does business. Defendant El-Hani's acknowledgment and agreement to comply with these laws avails himself to the privileges of conducting business here in the U.S. His contact with Xylem in New York in furtherance of his duties as Managing Director is more than just the "single act" required as discussed, *supra*.

Moreover, Plaintiff complained about Defendant El-Hani's discrimination and retaliation multiple times to individuals employed at Defendant Xylem's New York office. The investigation into Plaintiff's complaint and the decision to terminate Plaintiff was conducted in the New York's office. The investigation could only have been done with the participation of Defendant El-Hani. Since Defendants' discriminatory and retaliatory treatment (the termination) forms the basis for Plaintiff's claims, there is a substantial nexus between the business transactions and the discrimination and retaliation claims themselves. Therefore, this Court may exercise personal jurisdiction over Defendant El-Hani.

At the very least, Defendant El-Hani's contact with Defendant Xylem's NY Office, his participation in the investigation with NY personnel and his influence over the decision to terminate Plaintiff, which were all done in New York are areas that should be vetted in discovery. Defendant El-Hani's self-serving affidavit providing limited to no details about his actual contact with and/or presence in New York does very little to inform the Court as to whether his contacts are sufficient. While understanding that the burden lies on Plaintiff to establish jurisdiction, all of the information is squarely in the hands of Defendants; without some discovery it would be difficult to meet the burden except to indicate upon information and belief, Defendant El-Hani's position as Managing Director and his agreement to comply with US law per the code of conduct (See Exhibit B) avail himself to the privileges of conducting business here.

d. The Exercise of Jurisdiction does not offend Traditional Notions of Fair Play and Substantial Justice

Contrary to Defendants memorandum, the exercise of personal jurisdiction would not offend traditional notions of fair play and substantial justice. It is well-established that the Due Process Clause of the Fifth Amendment prohibits the exercise of jurisdiction over non-resident defendants unless those defendants have minimum contacts with the forum state and the exercise of jurisdiction does not violate principles of fair play and substantial justice. *See* World-Wide Volkswagon Corp v. Woodson, *444 U.S. 286, 291-92 (1980).* The determination of whether a court can exercise jurisdiction over a non-resident defendant is based upon the law of the state in which that court sits. *See Arrowsmith v. United Press International, 320 F.2d 219, 223 (2d Cir. 1963).*

Once Plaintiff has established that Defendant has "minimum contacts" with the forum state to justify the court's exercise of personal jurisdiction, the second stage of the due process inquiry asks whether the assertion of personal jurisdiction comports with "traditional notions of fair play and substantial justice" that is, whether it is reasonable under the circumstances of the particular case. *See International Show Company v. Washington, 326 U.S. 310 (1945).* The Supreme Court has held that the court must evaluate the following factors as part of this "reasonableness" analysis: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies. Burger King Corp. v. Rudzeqicz, 471 U.S. 462 91985).

Pursing this litigation in New York will have a minimum burden on Defendant El-Hani. As with any out of state defendant, El-Hani may appear for his deposition in his home country via video deposition. Considering Defendant El-Hani's economic status as an individual of means in Lebanon, a flight to New York would not be a financial burden on him. Secondly, New York has a strong interest in adjudicating this dispute. The New York State Human Rights Law protects nonresidents against individuals whose discrimination has an impact in New York. Defendant El-Hani worked for Defendant Xylem. Defendant Xylem's principal place of business is located in Westchester New York. With that, many of the employees who Plaintiff complained to about the discrimination reside in New York.

Thirdly, it seems axiomatic that Plaintiff will have a difficult time recovering in the

Lebanese court system. Due to the few resources offered in these foreign court systems, there is a chance that Plaintiff is given no relief for the egregious acts she faced at the hands of Defendants. Plaintiff faces an extremely difficult time obtaining an efficient resolution in a court system outside of the United States when all of the documents and individuals who Plaintiff complained to, conducted the investigation and decision to terminate Plaintiff (including Defendant Xylem's CEO) are in New York. In light of this, there is an interest for this court to adjudicate the matter to ensure that Plaintiff received a proper remedy.

C. PLAINTIFF'S COMPLAINT ESTABLISHES A CAUSE OF ACTION AGAINST DEFENDANT EL-HANI.

a. STANDARDS FOR DISMISSAL UNDER 12(b)(6)

Rule 12(b)(6) "provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. The standard of review on a motion to dismiss is heavily weighted in favor of the Plaintiff." Diaz v. NBC Universal, Inc., 536 F.Supp.2d 337, 341 (S.D.N.Y. 2008). "In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court is required to accept the material facts alleged in the complaint as true." Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991). "The court is also required to read a complaint generously, drawing all reasonable inferences from its allegations in favor of the plaintiff." Diaz, *supra*, at 341. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007). A plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Id*. at 1974. However, "this 'plausibility standard' is a flexible one, 'oblig[ing] a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.' Diaz, *supra*, at 342, *quoting* Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007). In light of the foregoing pleading standard, Defendant's Motion to Dismiss must be denied

b. Defendant EL-HANI's conduct had an impact in New York

The New York Executive Law, which is also known as the Human Rights Law, has an explicit provision regarding its extraterritorial application: The provisions of this article shall apply as hereinafter provided to an act committed outside this state against a resident of this state or against a corporation organized under the laws of this state or authorized to do business in this state, if such act would constitute an unlawful discriminatory practice if committed within this state." N.Y.C.L.S Exec § 298-a(1). Courts have interpreted this provision to apply to an act of discrimination committed outside of the state against a state resident, as well as to "a discriminatory act [that] was committed in New York. In order for a nonresident to invoke the protections of the NYSHRL and NYCHRL, she must show that the discriminatory act had an impact within the boundaries of the State and City, respectively. See Hoffman v. Parade Publ'n, 15 N.Y.3d 285 (N.Y. 2010).

While both the New York Court of Appeals and the Court of Appeals for the Second Circuit have held that the impact requirement is not satisfied simply by pointing to frequent communication with a managing office in New York and meetings there regarding local projects. See Fried v. LVI Servc., Inc., 500 F. Appr'x 39, 42 (2d Cir. 2012), the allegations set forth in Plaintiff's complaint far surpass any decision by this Circuit. As illustrated above, Plaintiff was in constant communication with individuals in the New York headquarters for months. Both Plaintiff's investigation and the decision to terminate her were made in New York.

Here, the protected activity occurred in New York when Plaintiff complained about the discrimination and retaliation. Moreover, Plaintiff asserts that the discriminatory decisions and investigations were conducted in New York. Therefore, Plaintiff can prove there was a discriminatory impact in the State of New York.

c. Plaintiff is not barred from claims against Defendant El-Hani

Defendant El-Hani argues that Plaintiff is barred from bringing her claims against him based on an employment agreement she signed requiring all disputes related to employment be "settled by the labor courts in Beirut." The enforceability of this employment agreement is at issue and is succeeded by the laws of New York. Such an affirmative defense would need to be closely examined during the discovery process.

D. DISCOVERY SHOULD NOT BE STAYED

a. Jurisdictional Discovery

If any doubts remain, Plaintiff should be permitted to conduct jurisdictional discovery, as this Court has discretion to order further discovery on the jurisdictional issue. See Alicea v. Lasar Mfg. Co., 1992 U.S. Dist. LEXIS 13027, at *2 (S.D.N.Y. 1992); Manhattan Life Ins. Co. v. A.J. Stratton Syndicate (No. 782), 731 F. Supp. 587, 593 (S.D.N.Y. 1990).

Courts have ordered jurisdictional discovery where a plaintiff made less than a *prima facie* showing but "made a sufficient start toward establishing personal jurisdiction." Uebler v. Boss Media, 363 F. Supp. 2d 499, 506-07 (E.D.N.Y. 2005); See also Ayyash v. Bank Al-Madina, 2006 U.S. Dist. LEXIS 9677, 2006 WL 587342, at *5 (S.D.N.Y. 2006) (ordering discovery upon a "threshold showing that there is some basis for the assertion of jurisdiction[,] facts that would support a colorable claim of jurisdiction"); Winston & Strawn v. Dong Won Secs. Co. Ltd., 2002 U.S. Dist. LEXIS 20952, 2002 WL 31444625, at *5 (S.D.N.Y. 2002) (denying motion to dismiss and permitting discovery "where the facts necessary to establish personal jurisdiction . . . lie exclusively within the defendant's knowledge"); Aerotel, Ltd. v. Sprint Corp., 100 F. Supp. 2d 189, 194 (S.D.N.Y. 2000) (denying motion to dismiss to permit plaintiff to take jurisdictional discovery despite plaintiff's "conclusory" allegations); Strategem Dev. Corp. v. Heron Int'l N.V., 153 F.R.D. 535, 547 (S.D.N.Y. 1994) (although plaintiffs had not made prima facie showing of personal jurisdiction, plaintiff made sufficient showing to warrant further discovery); Lechner v. Marco-Domo Internationales Interieur GmbH, 2005 U.S. Dist. LEXIS 4022, at *15 (S.D.N.Y. 2005) (allowing limited discovery regarding jurisdiction).

Therefore, if any doubts remain, the Court should reserve judgment on Defendants motion until Plaintiff can take jurisdictional discovery.

CONCLUSION

For the foregoing reasons, it is respectfully requested that Defendant's Motion to Dismiss the amended complaint be denied in its entirety.

Dated: New York, New York
April 25, 2016

________/s/_____________________
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